TRACTORS (M) BHD.

v.

PANMA HEAVY EQUIPMENT SDN. BHD.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CIVIL SUIT NO. K 1086 OF 1986]
24 FEBRUARY 1992

CIVIL PROCEDURE: *Striking out for want of jurisdiction, - Defendants office situated at Kuala Lumpur - Bought machine and goods in Sabah for use in Sabah - Monthly payments paid to Plaintiffs' headquarters in Kuala Lumpur - Courts of Judicature Act 1964, s. 23(1) - Judgment in default - Setting aside - Regular judgment - Any prejudice to Plaintiff.*

CIVIL PROCEDURE: *Service - Service of writ by way of ordinary registered post - Whether good service - Companies Act 1965, s. 350, Interpretation Act 1967, s. 12, Rules of the High Court 1980, O. 62 r. 4(1)(b).*

This was a summons-in-chambers application by defendants to set aside judgment in default of appearance entered against them and to strike out the Plaintiffs' suit for want of jurisdiction.

It appears that the defendants' office was situated in Kuala Lumpur but they bought the machine and goods in Sabah for use in Sabah. However monthly payment was paid to Plaintiffs' headquarters in Kuala Lumpur.

Plaintiffs had sent their letter of demand and a copy of the judgment in default to the defendant by "A.R. Registered" respectively. However, they choose to send the writ by way of ordinary registered post, which the defendant had denied receipt thereof.

Held:

[1] The High Court in Malaya and the High Court in Borneo have separate and distinct territorial jurisdictions. The act of buying the machine and goods in Sabah for use in Sabah can be deemed to be matters related to Borneo. However monthly payments were made to Plaintiffs headquarters in Kuala Lumpur.

[2] The Plaintiffs had complied with O. 62(1) r. 4 (1)(b) of the Rules of the High Court 1980 in sending the writ by ordinary registered post. It was up to the defendants to organise their receipt and deal with incoming mail.

[3] Recapping the above facts, evidence and the law, the Court should not set aside the writ. However, there does not appear to be any prejudice occasioned to the Plaintiffs if the judgment was set aside.

[4] In the circumstances the Court accordingly ordered that:

(a) leave be given for the defendants to appear.

(b) the judgment in default of appearance be set aside only upon defendants filing in their defence within 21 days.

(c) the action be transferred to High Court Malaya at Wilayah Persekutuan Kuala Lumpur after receipt of the defendants' defence.

(d) Each party to bear their own costs.

[Order accordingly.]

Cases referred to:
Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd. [1975] 2 MLJ 915 ***(foll)***
Lee Boon Tatt & Ors. v. Thakdir Trading Sdn. Bhd. [1984] 2 MLJ 341 ***(cit)***
Beale v. Macgregor [1886] 2 TLR 311 ***(cit)***
Harley v. Samson [1914] 30 TLR 450 ***(cit)***

Legislation referred to:
Companies Act 1965, ss. 119, 120, 121, 350
Courts of Judicature Act 1964, ss. 23(1)(a), item 12 of Schedule to s. 25(2)
Rules of the High Court 1980, O. 13 r. 8, O. 62 r. 4(1)(b)

For the Plaintiffs - Maureen Lind; M/s. Lind & Co., Kota Kinabalu
For the defendants - Abdul Ghani Matjair; M/s. Ghani & Co., Kota Kinabalu

JUDGMENT

Syed Ahmad Idid JC:

The summons-in-chambers application was made by the defendants under O.13 r. 8 and O. 62 r. 4(1) of the Rules of the High Court 1980 and s. 23(1) of the Courts of Judicature Act 1964. In brief, the defendants applied for the Plaintiffs' suit to be struck out for want of jurisdiction and the judgment in default of appearance be set aside.

Encik Ghani Mat Jair, of Counsel for the applicant, addressed the Court in Bahasa and I shall accordingly allude to his contentions in Bahasa.

Permohonan dibuat oleh pihak defendan meliputi tiga perkara:

1. Perintah bertarikh 1 Oktober 1986 diketepikan sebab writ tidak difail dengan betul;
2. Penyerahan writ tidak sempurna;
3. Fakta munasabah iaitu perjanjian jual-beli dibuat secara lisan. Tidak ada bukti defendan bersetuju membayar faedah.

Saya bersetuju bahawa sepertimana yang diperintah dalam kes *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co. Sdn. Bhd.* [1975] 2 MLJ 915 "the High Court in Malaya and the High Court in Borneo have separate and distinct territorial jurisdictions." Pejabat Panma Heavy Equipment Sdn. Bhd., terletak di Kuala Lumpur tetapi dengan tindakannya membeli mesin dan barang di Sabah untuk kegunaan di Sabah maka perkara ini boleh disifatkan sebagai berkait dengan Borneo. Sila lihat s. 23(1)(a) Akta Mahkamah Kehakiman, 1964, sepertimana yang diterangkan oleh Plaintiff "the cause of action arose in Sabah which is within the jurisdiction of the High Court in Borneo." Affidavit jawapan oleh Thien Thau Khiong bertarikh pada 21 Ogos 1987 di para. 6 menyebut:

> For the reasons stated hereinabove, I verily believe that case is not want of jurisdiction.

Tetapi defendan tidak bersetuju oleh sebab mereka telah membuat pembayaran bulanan kepada ibu pejabat Plaintiff di Kuala Lumpur.

(a) Mengenai dengan penyerahan writ yang dihantar secara pos, tindakan itu cuma ikut s. 350 Akta Syarikat 1965. Jika defendan telah tukar alamat, defendan telah tidak memberitahu Pendaftar Syarikat mengikut s. 119, 120 dan 121.

(b) I shall not go so far to say (and quote Ng Ser Voon in para. 8 of his affidavit affirmed on 6 February 1987) that "... the registered post containing the relevant writ of summons was lost through the post." But I observed a discrepancy in that the Plaintiffs sent

three important documents but only two by "A. R. Registered", first the letter of demand dated 12 May 1986 and then the copy of the judgment dated 16 October1988. But as for the writ, Plaintiffs chose to send it by ordinary registered post (with no return card).

(c) Nevertheless, I found that Plaintiffs had complied with O. 62 r. 4(1)(b) of the Rules of the High Court 1980. It was up to the company, in this case the defendants, to organise their receipt and dealing with incoming mail. Outsiders cannot organise for them.

There was, however, a letter from *Panma Heavy Equipment Sdn. Bhd.* (or the defendants here) addressed to "William Liaw, Chan, Lind & Co." dated 24 October 1986, and the copy was received by the High Court Kota Kinabalu on 29 October 1986. The content of that letter is illuminating and I reproduce it here:

24 October 1986

Suit No. K 1086 of 1986

Tractors Malaysia (1982) Sdn. Bhd v. Panma Heavy Equipment Sdn. Bhd.

With reference to the above, we are surprised to receive your A.R. Registered letter of 16 October 1986, enclosing a copy of the judgment when the one and only notice we have received from you so far with regard to the above was your Notice of Demand dated 12 May 1986 sent by A.R. Registered.

With no prior notice or a copy of the relevant summons being served on us, we are not aware of a suit being filed against us so we were not able to appear in Court or file our defence. We would therefore appreciate if you could send to us, for our reference, a copy of the relevant notice/summons showing evidence of it being served on us and by what means.

Please send us the particulars as soon as possible.

A copy of this letter was exhibited at "NSV3". I have directed my mind to the dates and the periods and it is manifest that:

(i) Notice of demand was dated 12 May 1986:

(ii) Writ filed on 8 August 1986:

(iii) Writ posted on 9 September 1986:

(iv) Judgment in default of appearance entered 1 October 1986:

(v) Plaintiffs A.R. Registered letter to defendants 16 October 1986:

Received by defendants 20 October 1986:

(vi) Defendants' response to Plaintiffs 24 October 1986:

Let me consider some of the posibilities :

(1) Either that such writ was received or not received by the defendant. In this action, there was evidence it was sent to the defendants.

(2) If the defendants received it, they could choose either to ignore it or to respond.

(3) If they ignored, then the judgment in default of appearance was the natural outcome and was proper and regular.

(4) Even if the defendants chose for some reason not to file in their defence in time, they may be allowed to do so soon after. (see*: Lee Boon Tatt & Ors. v. Thakdir Trading Sdn. Bhd.* [1984] 2 MLJ 341). The application to set aside must be made promptly but the Court can in a fit case disregard lapse of time. (*Beale v. Macgregor* [1886] 2 TLR 311).

Recapping the above facts, evidence and the law, I shall not set aside the writ. However, there does not appear to be any prejudice occasioned to the Plaintiffs, if the judgment is set aside. If there is any possibility of prejudice, I certainly will refuse to set the judgment aside. (see: *Harley v. Samson* [1914] 30 TLR 450).

I shall accordingly order:

1. That leave be given for the defendants to appear ;
2. That the judgment in default of appearance dated 1 October 1986, be set aside only upon the defendants filing in their defence at Kota Kinabalu Registry within twenty-one days of today. If the defendants fail or refuse or neglect to file in their defence as provided, the said judgment will then have full effect: and
3. This action be transferred to the High Court Malaya at Wilayah Persekutuan Kuala Lumpur in accordance with item 12 of the Schedule under s. 25(2) of the Courts of Judicature Act 1964, after the receipt of the defence as in 2 above. Thien Thau Khiong had in his affidavit "respectfully prayed that the proceedings be tranferred to the High Court within the jurisdiction so decided."
4. Each party to bear their own costs.

Also found at [1992] 3 CLJ 1648